PDR No. PD-0899-18
Appellate Cause No. 06-17-00161-CR
Trial Court No. 15F0716-202

PATRICK JORDAN Appellant	§	ON APPEAL FROM THE
VS.	§	202ND JUDICIAL DISTRICT
STATE OF TEXAS Appellee	§	BOWIE COUNTY TEXAS

SECOND MOTION TO EXTEND TIME FOR FILING STATE'S BRIEF

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the State of Texas by and through her below named Criminal District Attorney and pursuant to Texas Rules of Appellate Procedure and hereby requests an extension until Monday, April 15, 2019 at 12 pm of the time period for the filing of the State's Brief and in support of the same should show the Court as follows:

*In an abundance of caution, the State has attached the latest draft of the State's Original as Exhibit A in case this court denies the State's Second Motion for Extension of Time.

I.

1. This case is pending from the 202nd Judicial District of Bowie County, Texas.
2. The case is styled State of Texas v. Patrick Jordan, Cause No. PD-0899-18.
3. Appellant was found guilty of Deadly Conduct and sentenced to four years (4) in the Institutional Division of the Texas Department of Criminal Justice.
4. Appellant's Brief was filed on February 26, 2019 making the State's Brief originally due on or about March 28, 2019.

5. The State requested an extension of time for filing the State's Brief. The new deadline is April 12, 2019.
6. The Brief was not timely prepared in this matter due to the press of the business. Said business includes, but is not limited to, the following since Appellant's brief was filed:

- Preparation of writ of certiorari brief for *Owens v. State*, Cause No.18-7038;
- Preparation of brief for *Bryan White v. State*, Cause No. 06-18-00205-CR;
- Preparation for trial and meetings on State of Texas v. Gary Tanner Royal, Cause No. 18F1154-102—Aggravated Sexual Assault of a Child;
- Preparation for trial and meetings on State of Texas v. Melodi Roderick, 15F0846-102, Money Laundering. Trial originally set for April 16, 2019. Case settled on April 11, 2019;
- Preparation for trial and meetings on State of Texas v. Charles Garton, Cause No. 18F05323-102, Aggravated Sexual Assault of a Child. Trial set for May 21, 2019;
- Preparation for trial and meetings on State of Texas v. Russell Little, Cause No. 17F0573-102, Trial Set for June 11, 2019;
- Preparation of Bowie County Grand Jury on March 22, 2018 and April 4, 2019;
- Preparation for and meetings on pre-trial dockets on April 2, 2019.
- Attendance and preparation for and meetings on pre-trial dockets on March 5, 2019 and March 6, 2019.

II.

The State's attorney has been diligent in pursuing this appeal and is not seeking this extension for the purpose of delay.

PRAYER

WHEREFORE, on the bases of Rule 73 of the Texas Rules of Appellate Procedure, the State respectfully requests this Court to grant the Motion for Extension of Time for the filing of the State's Brief.

Respectfully submitted,

/s/ Randle Smolarz
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ASSISTANT DISTRICT ATTORNEY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion to Extend Time for Filing State's Brief was forwarded to counsel of record on April 12, 2019.

/s/ Randle Smolarz
Randle Smolarz

Exhibit A

No. PD-0899-18

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

Patrick Jordan, ***Appellant***

v.

The State of Texas, ***State***

On Discretionary Review From
The Court of Appeals for the Sixth District
Court of Texarkana, No: 06-17-00161-CR

Appealed from the 202nd Judicial District Court
Bowie County, Texas, No: 15F0716-202

BRIEF FOR THE STATE
The State Does Not Request Oral Argument

Respectfully Submitted:

Jerry D. Rochelle
Criminal District Attorney
Bowie County, Texas
601 Main Street
Texarkana, Texas 75501

By: Randle Smolarz
Assistant District Attorney
Texas Bar No. 24081154

Attorneys for the State

I. IDENTITY OF PARTIES AND COUNSEL

The following is a complete list of all the parties to the trial court's judgment as required by the provisions of Rule 38.2(a) of the Texas Rules of Appellate Procedure:

1. Defendant and Appellant:
   Patrick Jordan

2. Attorneys for Appellant Trial and Appeal:
   Bart C. Craytor
   Texas Bar No: 24014210
   126 West Second Street
   Mount Pleasant, Texas 75455

3. Attorneys for the State of Texas at Trial:
   Kate Curry Carter
   Michael Shepherd
   Assistant District Attorneys
   Bowie County, Texas
   601 Main Street
   Texarkana, Texas 75501

4. Presiding Judge at trial:
   The Honorable John Tidwell
   202nd Judicial District Judge
   100 North State Line Avenue
   Texarkana, Texas 75501

5. Attorney for the State of Texas on direct appeal and PDR:
   Randle Smolarz

II. TABLE OF CONTENTS

Page

III. INDEX OF AUTHORITIES

Cases

Statutes

IV. STATEMENT OF THE CASE

On May 26, 2017, a jury convicted Appellant of Deadly Conduct. The jury did not reach a unanimous decision on Aggravated Assault, and the trial court declared a mistrial for this charge only.[1] The jury assessed a punishment of four years in the Institutional Division of Texas Department of Criminal Justice and zero fine. The Sixth Court of Appeals held, among other things, that Appellant was not entitled to a multiple assailant instruction.[2] The Sixth Court of Appeals rejected Appellant's Motion for Rehearing.[3] However, Judge Burgess filed a detailed dissenting opinion stating he would grant the Motion for Rehearing because the arguments merited discussion. Judge Burgess ultimately indicated the new arguments may not change the result.

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[1] 5 RR 16.

[2] *Jordan v. State*, 558 S.W.3d 173 (Tex. App.—Texarkana 2018, pet. granted).

[3] *Jordan v. State*, 558 S.W.3d 173 (Tex. App.—Texarkana 2018, pet. granted)(motion for rehearing)(Burgess, dissenting).

V. REPLY TO POINTS OF ERROR I & II

A. Self-Defense Against a Group—No Matter the Association

Appellant's main argument for first and second issue are interrelated. The State will address each issue here.

1. Introduction

Appellant argues that a self-defense instruction was required because Varley and Crumpton were (1) parties to the hostile group, (2) participants in the fray, or (3) innocent bystanders.

2. Standard of Review

Review of a jury charge issue is a two-step process.[4] First, a determination whether error occurred in the charge.[5] Then, if error existed, the court reviews the record to determine whether the error caused harm sufficient to require reversal.[6] The level of harm necessitating reversal depends upon whether the error was preserved at trial.[7] If a defendant timely objects, a reviewing court should not reverse

[4] *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984); *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994).

[5] *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994).

[6] *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994).

[7] *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994).

unless the error caused some harm.[8] The defendant must have suffered some actual, not theoretical, harm.[9]

A defensive issue is raised by the evidence if there is some evidence, regardless of its source, on each element of a defense that, if believed by the jury, would support a rational inference that the element is true.[10] When deciding whether a defensive issue has been raised by the evidence, a court must rely on its own judgment, formed in the light of its own common sense and experience, as to the limits of a rational inference from the facts that have been proven.[11] "[I]n order to justify the submission of a charge to the jury on the issue of self-defense, there must be some evidence in the record to show that the defendant was in some apprehension or fear of being the recipient of the unlawful use of force from the complainant."[12] A person is entitled to a jury instruction "on every defensive issue raised by the evidence."[13] "The defendant is entitled to an instruction on a defense when there is legally sufficient evidence to

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[8] *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984)

[9] *Warner v. State*, 245 S.W.3d 458, 461 (Tex. Crim. App. 2008); *Arline v. State*, 721 S.W.2d 348, 352 (Tex. Crim. App. 1986).

[10] See *Shaw v. State*, 243 S.W. 3d 647, 657-658 (Tex. Crim. App. 2007).

[11] See *Shaw v. State*, 243 S.W. 3d 647, 657-658 (Tex. Crim. App. 2007).

[12] *Smith v. State*, 676 S.W.2d 584, 585 (Tex. Crim. App. 1984).

[13] *Matocha v. State*, 890 S.W.2d 144, 146 (Tex. App.—Texarkana 1994, pet. ref'd).

raise the defense, regardless of whether the evidence supporting the defense is weak or contradicted, and even if the trial court is of the opinion that the evidence is not credible."[14] "All of the evidence includes evidence produced by both the State and the defendant because the jury may accept or reject all or a part of any witness's testimony and choose to reject portions of testimony that are contradicted by other evidence."[15] "A defendant's testimony alone may be sufficient to raise a defensive theory requiring an instruction in the jury charge."[16] "[W]hen the evidence fails to raise a defensive issue, the trial court commits no error in refusing a requested instruction."[17]

3. Applicable Law

"A defendant is entitled to a charge on the right of self-defense against multiple assailants if there is evidence, viewed from the accused's standpoint, that he was in danger of an unlawful attack or a threatened attack at the hands of more than one assailant."[18] "The reasonableness

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[14] *Dugar v. State*, 464 S.W.3d 811, 816–17 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd).

[15] *Kemph v. State*, 12 S.W.3d 530, 532 (Tex. App.—San Antonio 1999, pet. ref'd).

[16] *Halbert v. State*, 881 S.W.2d 121, 124 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd).

[17] *Sanchez v. State*, 122 S.W.3d 347, 357 (Tex. App.—Texarkana 2003, pet. ref'd).

[18] *Frank v. State*, 688 S.W.2d 863, 868 (Tex.Crim.App.1985).

of the defendant's belief that deadly force was immediately necessary is judged from the standpoint of the accused at the time he acted."[19] A "reasonable belief" is one that "would be held by an ordinary prudent person in the same circumstances as the actor."[20] If the defensive issue of multiple assailants is "not raised by the evidence," there is no error in "refusing to include it in the charge."[21]

4. Preservation of Error

Article 36.14 of the Texas Code of Criminal Procedure mandates that a trial court submit a charge setting forth "the law applicable to the case."[22] However, "[a]n unrequested defensive issue is not the law applicable to the case."[23] A defendant cannot complain on appeal about the trial court's failure to include a defensive instruction that he did not preserve by request or objection because he has procedurally defaulted or waived any such complaint.[24] A defendant must object or request a special instruction to preserve error for review for the omission of

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[19] *Myles v. State*, 1999 Tex. App. LEXIS 8351, *6 (Tex. App.—Dallas Nov. 8, 1999, no pet.)(not designated for publication).

[20] Tex. Pen. Code § 1.07(a)(42).

[21] *McCray v. State*, 2009 WL 806892 (Tex. App.—Fort Worth Mar. 26, 2009, pet. ref'd)(not designated for publication).

[22] Tex. Code Crim. Proc. art. 36.14.

[23] *Taylor v. State*, 332 S.W.3d 483, 487 (Tex. Crim. App. 2011).

[24] *Vega v. State*, 394 S.W.3d 514, 519 (Tex. Crim. App. 2013)(citing *Posey v. State*, 966 S.W.2d 57, 6 (Tex. Crim. App. 1998)).

defensive instructions.[25] An objection must be "sufficient to call the trial court's attention to the omission in the court's charge".[26]

Appellant is requesting a self-defense instruction for Varley and Crumpton (as well as transferred justification) regarding deadly conduct, which would require "Summer Varley and Austin Crumpton" in the self-defense language.[27] Appellant proffered a Proposed Jury Instructions.[28] The final jury instruction only included a deadly conduct self-defense instruction for "Jordan Royal".[29] Appellant did not request this language at the charge conference[30], and the proposed instruction did not include this language. The self-defense definition[31] or Application Section for self-defense on deadly conduct does not include either "Jordan Royal, Summer Varley, and Austin Crumpton" or "Summer Varley and Austin Crumpton". Therefore, Appellant waived this self-defense instruction and transferred justification issue.

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[25] *Vega v. State*, 394 S.W.3d 514, 519 (Tex. Crim. App. 2013); *Arana v. State*, 1 S.W.3d 824, 827 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd).

[26] *Stiles v. State*, 520 S.W.2d 894, 896–97 (Tex. Crim. App. 1975).

[27] The trial court included a self-defense instruction for deadly conduct, and "Jordan Royal" is included in that instruction.

[28] CR 111.

[29] CR 140.

[30] CR 110 (The State also mentioned, "Judge, the only other thing that [Appellant] indicated to the State prior to the Court entering is that we have not included the specific language with regard to the deadly conduct charge").

[31] CR 117.

Finally, the final jury instruction did not include a "Defense of Others" section. The final jury instruction included a Defense of Others instruction. At the charge conference, the State informed the trial court that Appellant was requesting "or others" language for both defense of others.[32] The proposed jury instruction included a "Defense of Another Person" section. The defendant uses "Jordan Royal or others" in the Defense of Others section,[33] but the proposed jury instruction does not include either "Jordan Royal, Summer Varley, and Austin Crumpton" or "Summer Varley and Austin Crumpton" in the self-defense section for "Defense of Another Person". The brief only mentions "Defense of Others" in each Issue headings, but only discusses "others"[34] one time in the brief. Therefore, Appellant did not preserve this issue and did not adequately brief this issue.

5. Hostile Group

Appellant argues that Varley and Crumpton were assailants—or at least, members of a hostile group "by aiding, abetting, encouraging,

[32] CR 106.
[33] CR 120.
[34] Appellant's Brief at 11.

supporting Royal's pursuit of Appellant and Bryan through the parking lot and the anticipated physical conflict."[35]

- **Analysis**

Judge Keller's concurrence in *Dickey* discusses the outer reaches of the multiple assailants' instructions:

> For example, if a defendant were trapped in a house with several hostile individuals, some of whom were brandishing firearms and threatening the defendant, the defendant may be justified in using deadly force against a different person who was blocking an exit that would otherwise be a viable path of retreat. The use of deadly force against the person blocking the exit would be justified, even though that person possessed no firearms and made no threatening moves, because of that person's complicity with those who threatened the defendant's life. The rule concerning multiple assailants is essentially an application of the law of parties to the defendant's assailants.[36]

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[35] CR 14.

[36] *Dickey v. State*, 22 S.W.3d 490, 493 (Tex. Crim. App. 1999)(Keller, concurring); *State v. Cooper*, 128 N.M. 428, 432 (Ct. App. 1999)("Other courts that have considered this question have held that a multiple aggressor self-defense instruction is warranted even when the person the defendant assaulted never posed a direct threat of bodily harm to the defendant, as long as there is evidence that the person the defendant assaulted participated or acted in concert with the assailant."); *Duckett v. State*, 966 P.2d 941, 945–47 (Wyo. 1998)(a Wyoming court analyzed a case depicting Keller's main point—

> Viewing the evidence in the light most favorable to Duckett, we find the evidence sufficient to warrant an instruction on the defense of others. Carlson initiated the fight when she grabbed Mrs. Duckett and threw her to the floor. Carlson was intoxicated, and was much larger than her victim. Hetler attacked Duckett to prevent Duckett from interfering with the assault on Mrs. Duckett. Duckett, and presumably

Prior cases contemplate that a defendant may be entitled to a multiple assailant's instruction when a victim was a "party"[37] or "in any way aiding or encouraging the attack"[38]. "[S]omething more than the victim's mere presence in the group is required.[39]

- **Varley**

In *Gamino v. State*[40], the defendant testified to the following events: the defendant and girlfriend walked past three men in a parking lot. The men threatened the defendant and the girlfriend by making several statements—"grab her ass", "F her if they wanted to," and to "kick [his] ass." The defendant felt scared because the victim aggressively approached him (with only fists), and the defendant was disabled. As a

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> Hetler, saw Carlson beating Mrs. Duckett's head against a concrete floor. Mrs. Duckett was screaming as Duckett and Hetler struggled, and both participants continued to hear Mrs. Duckett's head hitting the cement. Despite Duckett's frantic pleas for help in rescuing his wife, Hetler deliberately held Duckett back while Carlson continued her assault. It was only then that Duckett used his knife to break free. Even then, Duckett was again prevented from assisting his wife. Left with no other choice, he fled for help.

The court held that defendant was entitled to defense of others instruction.).

[37] *Horn v. State*, 647 S.W.2d 283 (Tex. Crim. App. 1983); *Black v. State*, 65 Tex. Crim. 336, 343–44 (1912).

[38] *Stacy v. State*, 77 Tex. Crim. 52, 70 (1915)(on motion for rehearing).

[39] *Jordan v. State*, 558 S.W.3d 173 (Tex. App.—Texarkana 2018, pet. granted)(motion for rehearing)(Burgess, dissenting)(interpreting Judge Keller's concurring opinion in *Dickey*).

[40] *Gamino v. State*, 537 S.W.3d 507, 513 (Tex. Crim. App. 2017).

result, the defendant pointed his weapon at the three men. The trial court denied the self-defense charge. The jury convicted the defendant of aggravated assault with a deadly weapon. The lower court held "under Appellant's version, his use of a deadly weapon did not constitute the use of deadly force and that Appellant was not disqualified from receiving a self defense instruction notwithstanding the fact he was charged with aggravated assault with a deadly weapon." "At the end of the evening, as [defendant and girlfriend] were heading toward his truck, she said that three men confronted them, and one man threatened her. Rodriguez testified that she feared for her life." "Appellant testified that … [a victim] stood up and approached them in an aggressive manner …" The Court of Criminal Appeals held that the defendant was entitled to the non-deadly force self-defense instruction because the defendant only pointed the gun at the victims.

Here, the State agrees with the conclusion of Judge Burgess that *Gamino* is inapposite to the case at issue because "[Appellant]'s use of deadly force was not directed against the man who approached him—Royal—but against Crumpton and Varley" and "there was no evidence

that Crumpton and Varley used or attempted to use unlawful deadly force".

- **Crumpton's Abandonment**

No testimony raises the potential of Crumpton's attempted "deadly force". Even if so, any attempted "deadly force" from Crumpton had been abandoned. In *Tanguma*[41], a jury convicted the defendant of murder. The court of appeals addresses the issue of multiple assailants. The court found no reversible error. "[A]ppellant's own testimony showed that, from his standpoint, he did not fear an attack from anyone but Morin at the time he fired." The defendant testified that "he had not seen or heard Maldonado since the very beginning of the fight". The trial court included a self-defense instruction against the victim (who used a knife). The issue on appeal was multiple assailants. "Although the testimony of Gotcher and Maldonado arguably placed Maldonado in a position to be a possible threat to appellant, neither one could testify to appellant's state of mind at the time he killed Morin." "Appellant did not remain silent; he took the stand and testified that he had not seen or heard Maldonado since the very beginning of the fight." "[J]ustification of self-defense was not

[41] *Tanguma v. State*, 721 S.W.2d 408, 412 (Tex. App.—Corpus Christi 1986, pet. ref'd).

available where assailant, although present in the defendant's periphery, had abandoned his attack on the defendant at the time the defendant discharged his weapon." Here, Crumpton initially followed Appellant and Bryan into the parking lot.[42] The mere fact that Crumpton "running over there to [Bryan] and standing over him"[43] is not sufficient to say an unlawful attack was continuing on Bryan nor Appellant. No testimony suggested that Crumpton made any movement towards Appellant. Appellant did elicit testimony suggesting that Crumpton kicked Bryan. Appellant testified he did not perceive Crumpton at that time. Therefore, like in *Tanguma*, any threat from Crumpton was abandoned.

6. Fray

Appellant argues that a new group should delineated—"in the fray"[44] or "participants".[45] Appellant cites *Dugar* (discussed below) for this contention. The *Dugar* court concluded that there was a fact issue whether the victim was an innocent bystander or an assailant. A "participant" in this context seemingly means that the individual is in

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[42] 4 RR 65.

[43] 4 RR 37.

[44] Appellant's Brief at 11 ("A bullet struck Varley as she was in the fray.").

[45] Appellant's Brief at 11 (footnote 5)("Even though Varley, Crumpton, Prichard and Stevenson did not appear to be a primary threat to Appellant and Bryan, they were participants and changed the dynamics of the situation.").

the group, but the person does not make any moves that aids or abets a defendant. However, the same law applies, which is exemplified by *Barron v. State*[46] (discussed below)—the defendant's perception controls.

No Texas statute defines "assailants". The common meaning indicates a proactive measure attempting violence.[47] This comports with Judge Burgess's interpretation—"More than mere presence" or a "party to the group". The standard definition forecloses on an intermediate, which includes passive member of a group. What if a person "directs" or "encourages" in a covert manner, and the defendant does not perceive it? A defendant's perception would still control and determine whether the complainant is an assailant or innocent bystander. If an intermediate group existed, how do you deal with it? Therefore, the existing rule does not contemplate an intermediate group.

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[46] *Barron v. State*, 5 S.W. 237 (Ct. App. 1887).

[47] Assailant, Black's Law Dictionary (2nd ed. 1910)("to describe a person who assaults another person."); Assailant, In Merriam Webster Online, Retrieved April 12, 2019, from https://www.merriam-webster.com/dictionary/assailant# ("a person who attacks someone violently"); Assailant. In Oxford English dictionary. Retrieved from https://en.oxforddictionaries.com/definition/assailant ("A person who physically attacks another.").

7. Innocent Bystander

Appellant argues that a self-defense instruction was erroneously excluded even if Varley and Crumpton are innocent bystanders.[48] Texas law does not allow for an innocent bystander to be harmed or killed without more. There must be apparent danger of the innocent bystander from the defendant's perspective. "The language of these provisions logically implies that 'the other' who uses or attempts to use unlawful force ... is 'the person against whom the force was used.' "[49]

In *Ortiz*[50], the court held that the defendant was not entitled to a defense of others instruction. The defendant was in a vehicle with other occupants and shot into a hostile group. The defendant requested a defense of others instruction.

> [T]here was no evidence suggesting that the victim was involved in shooting at the car. There was no evidence that he had a gun or that one was found near his body. There was testimony that he did not have a gun and that he had not fired at the car.

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[48] Appellant's Brief at 19.

[49] See *Macias v. State*, 2015 WL 1181191, at *6 (Tex. App.—Corpus Christi Mar. 12, 2015, pet. ref'd)(mem. op., not designated for publication)(quoting Tex. Pen. Code § 9.31(a)(1)).

[50] *Ortiz v. State*, 1999 WL 1054694, at *2 (Tex. App.—Texarkana Nov. 23, 1999, pet. ref'd)(not designated for publication); See also *Stacy v. State*, 77 Tex. Crim. 52, 70 (1915)(on motion for rehearing)("The co-defendant "was not in any way making any attack upon [defendant], nor in any way aiding Joe to do so.").

In other words, there was no evidence for the defendant to perceive that the victim was a party to the group. The trial court did not commit error by refusing a defense of others instruction.

In *Barron v. State*[51], an innocent bystander accompanied a hostile person toward an altercation, but the defendant was not aware the victim did not have hostile intentions.

> [D]ecease[d], when killed, had gone to the place where he was killed to prevent or stop the difficulty between his sons and the Barrons, and that, at the instant he was shot, his hands were elevated in front towards the Barrons, as if imploring them to desist from the shooting. It was error to decline and refuse to give this instruction in charge to the jury in view of the facts in the case."[52]

The court held that the defendant was entitled to the proposed charge. The defendant perceived apparent danger from a person in a hostile group. However, there was not a lengthy discussion how long the innocent bystander elevated his hands were raised before the defendant shot him (i.e. was there enough time to allow defendant to perceive the victim as an innocent bystander). Testimony showed his hands were elevated at the "instant" he was shot, which does not indicate enough time to perceive that he was an innocent bystander. This still does not

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[51] *Barron v. State*, 5 S.W. 237 (Tex. App. 1887, no pet.).
[52] *Barron v. State*, 5 S.W. 237, 238 (Tex. App. 1887, no pet.).

allow harming a pure innocent bystander—more than mere presence is required. Therefore, the proposed jury instruction allowed the jury to assess whether the defendant perceived the victim as an innocent bystander—"not knowing his innocent intention, but believing he was acting and participating with his sons in such unlawful and violent attack".

In *Lackey*[53], the defendant discharged a firearm at an innocent pedestrian approaching him:

> There is no testimony that prior to the difficulty the deceased spoke any words, did any act, or made any demonstration of hostility toward the appellant, other than, as testified by appellant, to walk toward him. There is no testimony that the deceased was armed at the time. … The facts presented would not have supported a finding by the jury that appellant had reasonable grounds for believing that he was in danger of death or serious bodily injury at the hands of the deceased. Therefore, the issue of self-defense against a deadly attack was not raised.

The court held that the defendant was not entitled to non-deadly force self-defense instruction because an there was not an actual attack.

- **Transferred Justification**

Appellant argues that if he would have been justified in shooting Royal, then the justification should transfer to Varley and Crumpton.

[53] *Lackey v. State*, 166 Tex. Crim. 387, 389–90 (1958).

Appellant failed to object or make this request at trial and thus, has failed to preserve error.[54] Therefore, Appellant failed to preserve this issue.

Appellant relies on *Jackson v. State*[55] to argue that Appellant is entitled to use deadly force against an innocent bystander because Appellant was justified in using deadly force against the primary aggressor. Appellant is arguing that a justification defense can transfer between parties. Appellant did not request any transferred intent instructions.

(a) Applicable Law

Transferred justification states that a defendant is "justified under the laws of self-defense in shooting at the intended victim, the unintentional killing of an innocent bystander,"[56] "[the defendant] would not be guilty of any offense whatever".[57] Section 9.05 is an exception to this rule.

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[54] See *Vega v. State*, 394 S.W.3d 514, 519 (Tex. Crim. App. 2013); *Posey v. State*, 966 S.W.2d 57, 62 (Tex. Crim. App. 1998) (finding Article 36.14 imposes no duty on a trial judge to instruct the jury sua sponte on unrequested defensive issues because an unrequested defensive issue is not the law "applicable to the case").

[55] *Jackson v. State*, 66 Tex. Crim. 469, 470 (1912).

[56] *Plummer v. State*, 1878 WL 8989, at *1 (Tex. App. 1878, no pet.).

[57] 40 C.J.S. Homicide § 179; see also *Brunson v. State*, 764 S.W.2d 888, 891 (Tex. App.—Austin 1989, pet. ref'd); see also *Carson v. State*, 57 Tex. Crim. 394, 398–99 (1909); *Caraway v. State*, 263 S.W. 1063 (Tex.Cr.App.1923).

(b) Analysis

Transferred intent cannot be used to justify the accidental killing of a bystander. The facts do not support a transferred intent instruction. As a result, transferred justification is not supported in this case. The law of transferred intent is applicable when a defendant intends to discharge a firearm at one person but the bullet strikes another person.[58] This doctrine does not apply when a defendant knowingly discharged a firearm at the victim.[59] Appellant testified that he knowingly discharged the firearm directly at Royal.

No evidence was presented that Appellant observed Varley or Crumpton directly in his vicinity immediately prior to discharging the firearm. Furthermore, Appellant did not argue that Appellant aimed at Royal and simply missed the intended target. Rather, the jury found that Appellant knowingly discharged the firearm in the direction of Varley and Crumpton. Thus, the record does not support an instruction on transferred intent.[60]

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[58] See Tex. Pen. Code § 6.04(b).

[59] *Martinez v. State*, 844 S.W.2d 279, 282 (Tex. App. - San Antonio 1992, pet. refd).

[60] See *Martinez*, 844 S.W.2d at 282 (Tex. App.—San Antonio 1992, pet. ref'd)(holding court did not err by not charging on transferred intent when theory not supported by the record where defendant intentionally shot victim); see also *Finch v.*

In *Jackson v. State*[61], the party host ejected patron from the party. Patron retrieved a firearm, and other partygoers disarmed patron several times. Eventually, patron put a quart bottle in his holster. "It is left in doubt as to whether [patron] made the first demonstration with the quart bottle, or [defendant] placed his hand where he subsequently got his pistol." "If it was in the case as to [patron], then it unquestionably was in the case as to [victim]. The testimony showed that defendant did not intentionally shoot victim—but was intending to shoot patron. The trial court did not include a self-defense instruction. The court held that the defendant was entitled to a self-defense instruction as it related to patron. First, *Jackson* concerned an accidental killing of an unintended innocent bystander. The defendant intended to kill patron, but the defendant missed and struck the victim. The defendant did not have any intention of harming the victim.[62] The jury at issue here held that

State, 2016 WL 2586142, at *6 (Tex. App.—Dallas May 4, 2016, pet. ref'd)(not designated for publication)(holding no charge error for failing to provide a statutory presumption favoring the defendant when not entitled to the presumption based on the evidence); Tex. Code Crim. Proc. art. 36.14 (trial court must provide the jury with "a written charge distinctly setting forth the law applicable to the case.").

[61] *Jackson v. State*, 66 Tex. Crim. 469, 470 (1912).

[62] *Jackson v. State*, 66 Tex. Crim. 469, 470 (1912)("There seems to be no question of the fact that appellant had nothing against [the victim], and may not have seen him; but, be that as it may, if [defendant] fired the shot, it was fired at [the person who had the whisky bottle], and not at [the victim].").

Appellant knowingly shot at the Varley and Crumpton. Second, even if *Jackson* applied to our facts, Appellant received the benefit of a self-defense instruction regarding deadly conduct. Third, Section 9.05 of the Texas Penal Code specifically precludes a justification in that scenario. Section 9.05 states that even if an actor may be justified against another "the justification ... is unavailable in a prosecution for the reckless injury or killing of the innocent third person."[63] Even if justified in using deadly force against Royal, Appellant would not have been justified in recklessly killing an innocent bystander.[64] Fourth, Appellant did not request any language in the Proposed Jury Instruction. This was not argued at the trial court. Appellant cannot complain on appeal where he received the benefit of an instruction.[65]

B. Testimony Did Not Raise Each Element of Self-Defense

Under Section 9.32, a defendant may raise the issue of self-defense, via his own testimony or other evidence, if (1) Section 9.32 requirements are met; (2) the victim caused the defendant to reasonably believe deadly

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[63] Tex. Pen. Code § 9.05.

[64] See also *Vidal v. State*, 418 S.W.3d 907, 911 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd)(finding court did not err in denying appellant's request for a defense of others instruction under section 9.33 because appellant was being prosecuted for the reckless injury of an innocent third person, citing section 9.05).

[65] *Powers v. State*, 396 S.W.2d 389 (Tex. Crim. App. 1965).

force was immediately necessary; and (3) to protect herself against the other's use or attempted use of unlawful deadly force.[66] A defendant is "entitled to a jury instruction on self-defense only if she presents some evidence on each of these conditions."[67] "[T]o justify the submission of a charge to the jury on the issue of self-defense, there must be some evidence in the record to show that the defendant was in some apprehension or fear of being the recipient of the unlawful use of force from the complainant."[68] "A defendant's testimony alone may be sufficient to raise a defensive theory requiring an instruction in the jury charge."[69]

1. Testimony Did Not Sufficiently Raise Elements Under Section 9.31

- **Imperfect Self-Defense**

Appellant argues that Appellant is entitled to the self-defense instruction even though Appellant may have used excessive force.[70] The

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[66] Tex. Pen. Code § 9.32; *Preston v. State*, 756 S.W.2d 22, 24–25 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd).

[67] *Halbert v. State*, 881 S.W.2d 121, 124 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd).

[68] *Smith v. State*, 676 S.W.2d 584, 585 (Tex. Crim. App. 1984).

[69] *Halbert v. State*, 881 S.W.2d 121, 124 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd).

[70] Appellant does not argue imperfect self-defense at trial or on direct appeal. As a result, Appellant waived this issue.

argument is that if fists are not "deadly force" and Appellant used a firearm, which is not allowed under Section 9.31, then *Maynard* would apply.

> This court has held that the right of self-defense obtains against any character of unlawful attack, and that in a proper case it is error to restrict the right of self-defense, as was done in this case. The jury may have believed that Davis was about to attack appellant with the poker, or that it so appeared to appellant from his standpoint, and he would have the right to defend himself against such unlawful attack, even though he did not believe it would result in the loss of life or serious bodily injury to him. In a proper case the court might be called on to charge on the use of excessive force, but the right of self-defense should not be improperly restricted.[71]

"The jury may have believed that [victim] was about to attack appellant with the poker, or that it so appeared to [defendant] from his standpoint, and it would seem that he would have the right to defend himself against such unlawful attack, even though he did not believe it would result in the loss of life or serious bodily injury to him. In a proper case the court might be called on to charge on the use of excessive force, but the right of self-defense should not be improperly restricted."

[71] *Maynard v. State*, 98 Tex. Crim. 204, 209 (1924)(emphasis added).

2. to protect herself against the other's use or attempted use of unlawful deadly force

In *Halbert*[72], the defendant retrieved a firearm and entered the room. Victim started to slowly walk toward defendant, and the victim stated he was going to kill her. The defendant discharged the firearm. "The mere fact that she believed he would attack her is insufficient to give rise to a right to a self-defense instruction." "[T]his belief along with evidence of overt acts or words that would lead appellant to reasonably believe she would be attacked is sufficient to satisfy the statute." The defendant was entitled to a deadly force self-defense instruction.

Appellant first testified he saw Royal punch Bryan. Then, later Appellant conceded that he merely heard the result. This also raises an issue of the apparent danger in Appellant's mind because the amount that Appellant saw might not be enough, and Appellant did not observe Royal punching Bryan. Appellant testified that he heard a noise, but this testimony did not raise the issue that Appellant reasonably believed an unlawful attack was imminent.

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[72] *Halbert v. State*, 881 S.W.2d 121, 125 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd).

The law allows for deadly for against a non-primary assailant when the primary assailant only displayed his fists—as long as the primary assailant has demonstrated the manner and means. It is important to note the slight difference between "deadly force" and "deadly weapons". *Gamino* demonstrates the difference. In *Wellborn*[73], the defendant presented testimony that the victim struck the defendant in the face while passing by him. The victim was "somewhat stronger, more vigorous, and much younger" and "got him down on the floor and was beating him, and while in this condition there was a pistol fired, and [the defendant] says he immediately fired two shots."[74] The court held that the defendant was entitled to a self-defense instruction because the defendant reasonably believed an unlawful attack was immediate. "[The defendant] had a right to view it in the light of a conspiracy, and that [victim] was to bring it on, and he had a right to kill him before all conspiring parties attacked him." The court held that the defendant was entitled to the self-defense instruction.

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[73] *Welborn v. State*, 78 Tex. Crim. 45, 50–51 (1915).

[74] The court notes the defendant had "a right to shoot, and to shoot until he relieve himself of the impending danger, whether the other parties had anything to do with the trouble or not, or when they came into the difficulty".

"Deadly force" is force "intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury."[75] "Serious bodily injury" is an injury that creates a "substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."[76] "A sole attempted punch does not satisfy these definitions."[77] Discharging a deadly weapon in response to a sole punch is not reasonable response.[78]

In *Ferrel*[79], the victim wielded a full bottle of beer. "[T]he actual blow of the bottle indisputably caused serious bodily injury to [the victim], [the defendant] by definition used deadly force." The victim was in a persistent vegetative state. Therefore, the defendant was entitled to a Section 9.32 self-defense instruction—as opposed to a Section 9.31

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[75] Tex. Pen. Code § 9.01(3).

[76] Tex. Pen. Code § 1.07(a)(46).

[77] *Bundy v. State*, 280 S.W.3d 425, 434–35 (Tex. App.—Fort Worth 2009, pet. ref'd); see *Schiffert v. State*, 257 S.W.3d 6, 14 (Tex. App.—Fort Worth 2008, pet. ref'd)(concluding that a punch could not demonstrate an "attempt to use deadly force"); see also *Castilleja v. State*, 2007 WL 2163111, at *4 (Tex.App.-Amarillo July 24, 2007)(mem. op., not designated for publication) (holding that a proper response to a fist fight was not deadly force).

[78] *Bundy v. State*, 280 S.W.3d 425, 434–35 (Tex. App.—Fort Worth 2009, pet. ref'd).

[79] Tex. Pen. Code § 9.01(3); *Ferrel v. State*, 55 S.W.3d 586, 591–92 (Tex. Crim. App. 2001).

instruction. The rule in *Ferrel* assumes that an item/weapon is a capable of "deadly force" and only when evidence to the contrary should a trial court include a Section 9.31 instruction.

In *Petty*[80], a son arrived at defendant's house looking for money owed. The defendant declined because he owed it to the father. The son stated, "You are going to get hell beat out of you". The son left and returned with his father. A heated argument ensued. The father and son demanded oats—if the defendant did not have the money. Son left the immediate vicinity to start loading oats in to the vehicle. The inched closer and closer with his fists clenched. The defendant thought he was going to cause him harm. The defendant stabbed the victim. "I just thought it had come to the point where both of them were going to jump on me." There was no indication that either father or son had a deadly weapon. The trial court erroneously denied a multiple assailants charge.

In *Dearborn*[81], the court held that the defendant did not raise evidence of an attempted kidnapping or burglary. The record does not have any evidence to raise the issue that the defendant felt the victim

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[80] *Petty v. State*, 126 Tex. Crim. 185, 187 (1934).

[81] *Dearborn v. State*, 420 S.W.3d 366, 378 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

would use or attempt to use deadly force against him. No evidence showed the victim had any weapons—except fists. "[C]ourts have not treated blows with fists as deadly force." The court held that the defendant was not entitled to a self-defense instruction.

In *Halbert*[82], the court held that the defendant was entitled to a self-defense instruction. The court analyzed the difference in physical statute. The male victim weighed 186 pounds (and "well-developed and well-nourished") and the female defendant weighed 126 pounds.

In *Brisco*[83], the defendant knew the deceased (who was 70 years old) for forty years and knew he had terrible eyesight. The victim attacked the defendant with a knife.

In *Braughton*[84], "at the moment of the shooting, Dominguez had ceased using any force at all, and the punches he had landed on Braughton Sr. up to that point do not amount to deadly force that could create a reasonable belief that deadly force was necessary."

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[82] *Halbert v. State*, 881 S.W.2d 121, 125 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd).

[83] *Briscoe v. State*, 90 Tex. Crim. 650, 652 (1921); but see *Brown v. State*, 103 Tex. Crim. 420, 422 (1926)(the trial court properly excluded testimony that the witness "weighed 110 pounds, and the deceased weighed about 175 pounds.").

[84] *Braughton v. State*, 522 S.W.3d 714, 732 (Tex. App.—Houston [1st Dist.] 2017).

In *Laake*[85], the defendant had several obvious physical maladies—such as "badly hurt just prior to this homicide" and "he moved about with difficulty". These maladies were considerations whether the defendant was entitled to a self-defense instruction. The victim was "advancing upon [defendant] with an axe at the time he was shot by [defendant]." "It is difficult for us to conceive how this condition of deceased could fail to be known and observed by appellant."

In *Lerma*[86], the defendant and uncle had an altercation regarding payment of services. The victim left and returned with the victim. The uncle wanted to fight and took off his shirt. The defendant saw a firearm in the waistband of the victim. The defendant immediately left and went to his car. The uncle and victim pursued the defendant. There was no testimony that the friend pointed to the firearm or threatened the defendant in any manner. "When appellant looked back, he saw [uncle] and [victim], along with [a friend of uncle] and some of the women guests coming towards him." While inside his vehicle, he grabbed his firearm and laid it in his lap. A person reached in and "pulled" the firearm. The

[85] *Laake v. State*, 93 Tex. Crim. 84, 87 (1922).

[86] *Lerma v. State*, 807 S.W.2d 599, 601 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd).

shot killed the victim. The court reversed and required a multiple assailants charge. Is just the appearance of a firearm enough—even in light of *Gamino* and Section 9.04? The friend was drunk and aggressive and invited the defendant to fight. Taking off the shirt indicated a fist fight. Is the defendant supposed to disregard that the friend is capable of shooting him in a matter of seconds? Here, Royal had his fists. Fists are not generally "deadly force" or "deadly weapons". "[C]ourts have not treated blows with fists as deadly force."[87] As a matter of policy, should a person use a "per se" deadly weapon against only fists—in any circumstance? Is a person open himself up to serious bodily injury or death because he approaches aggressively with his fists?

Judge Burgess discusses that a person who approaches (irrespective if the primary aggressor is in a hostile group) may have different circumstances or weapons (i.e. abilities that may not be apparent). It may be immediately obvious[88] that an approaching large

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[87] *Dearborn v. State*, 420 S.W.3d 366, 378 (Tex. App.—Houston [14th Dist.] 2014, no pet.); see e.g., *Bundy v. State*, 280 S.W.3d 425, 435 (Tex.App.-Fort Worth 2009, pet. ref'd); *Starks v. State*, 127 S.W.3d 127, 132–33 (Tex.App.-Houston [1st Dist.] 2003); *Ogas v. State*, 655 S.W.2d 322, 324 (Tex.App.-Amarillo 1983, no pet.).

[88] *Ferrel v. State*, 55 S.W.3d 586, 592 (Tex. Crim. App. 2001)("Because we have found that the actual blow of the bottle indisputably caused serious bodily injury to McManus, Ferrel by definition used deadly force.").

muscular person may use fists as deadly weapons where a person with small physique with asthma only showing fists are would not be not deadly weapons.[89] Circumstances and context may be an issue.

Here, Jordan was an obvious physical superiority over Appellant. However, nothing that would indicate anywhere near a "per se" weapon cause his hands to be deadly weapons. "A knife is not a deadly weapon per se."[90] Self-defense requires about "deadly force"—as opposed to "deadly weapon".[91] No testimony suggests that Appellant knew Jordan's fists were "deadly force" or "deadly weapons". Would Patrick be entitled to a jury charge of self-defense? This issue can be parsed in different ways: (1) the court could determine that fists are not deadly weapons and responding with deadly weapon when approached with solely fists is not reasonable; (2) this court could treat fists like "per se" deadly weapons[92];

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[89] See also *Batchan v. State*, 104 Tex. Crim. 398, 399 (1926)(the trial court erroneously denied evidence that "appellant offered to prove by the witness Russell that Herbert Batchan was a physical weakling and was subject to epileptic fits at times, and that on account of said fits he was of a highly nervous temperament").

[90] *Brown v. State*, 651 S.W.2d 782, 783 (Tex. Crim. App. 1983)(footnote 2).

[91] The *Gamino* opinion exemplifies this distinction. *Gamino v. State*, 537 S.W.3d 507, 513 (Tex. Crim. App. 2017).

[92] The court in *Braughton v. State*, 522 S.W.3d 714, 732 (Tex. App.—Houston [1st Dist.] 2017) cites several cases on points—

> See Bedolla v. State, 442 S.W.3d 313, 317 (Tex. Crim. App. 2014) (distinguishing between purportedly defensive punching as force and running over victim with car as deadly force); see also Bundy v. State, 280 S.W.3d 425, 435 (Tex. App.–Fort Worth 2009, pet. ref'd) (stating that

or (3) fists are not "per se" deadly weapons and can only be demonstrated by the manner and use. If fists are determined not "per se" deadly weapons, there is a cause and result issue (i.e. deadly weapon can only be demonstrated after a person wields the deadly weapon in a certain way and certain weapons require actual use before they are deadly weapons). If an angry mob starts to run after a defendant with a spoon, but unbeknownst to the defendant, the mobster was hiding the sharp edge. However, the defendant does not actually see the sharp edge just as the victim is barreling the sharp edge toward his chest. The question is whether the defendant can use deadly force prior the victim wielding the spoon. Probably not because the law requires the defendant to perceive such deadly force. If that is the case, then Appellant would not have been able to shoot Royal prior to landing the punch on Bryan. What if Royal had not attack Bryan at all? Appellant would most likely not

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"attempt to punch appellant ... was not deadly force" justifying defensive deadly force); Schiffert v. State, 257 S.W.3d 6, 14 (Tex. App.–Fort Worth 2008, pet. ref'd) (holding that reasonable jury could not have found that actor was justified in using deadly force when other person's only use of force was striking with fist); cf. *Rue v. State*, No. 01-11-00112-CR, 2012 WL 3525377, at *3 (Tex. App.–Houston [1st Dist.] Aug. 16, 2012, pet. ref'd) (mem. op., not designated for publication) ("Hands are not deadly weapons per se, but they can become deadly weapons depending on how the actor uses them.").

have been entitled to a Section 9.32 instruction unless Royal demonstrated the force of his fists on Appellant. Then, Appellant would unlikely be able to respond with deadly force because the fists, which are now deadly weapons, caused serious bodily injury. Then, there is an issue when a "per se" weapon" is not wielded in a deadly way. The Court of Criminal Appeals has acknowledged that obvious evidence that a person cannot wield a deadly weapon renders the weapon non-deadly.

- **Proposed Rules for Fists as Deadly Weapons**

When an assailant approaches with no apparent weapon (i.e. only fists), it is unreasonable for a person to believe deadly force is being used. However, this belief may be reasonable if there are obvious signs to make certain that an assailant can use deadly force. These signs can manifest in different ways such as: (1) past knowledge of assailant's physical superiority and ability to utilize it, (2) obviousness (analyzed by the dissenting opinion by Judge Burgess), (3) a defendant has a condition that would cause serious bodily injury if fists were used (similar to *Gamino*) because the law allows the defendant's belief to dictate "some evidence", or (4) current use. Here, nothing in the records establishes (1), (2), or (3). Royal demonstrated (4) and what could amount to be deadly

force. However, the language discussed in *Dickey* in the concurrence should apply. Appellant was not entitled to a "multiple assailant" charge.

An alternative approach would be for the jury to decide. "In view of another trial, we would suggest that the court do not assume that the knife used by appellant was a deadly weapon but to submit the issue to the jury as to whether or not the knife, from the manner of its use, was calculated to produce death or serious bodily injury."[93] This approach may still be subject to "some evidence" standard to include in the jury charge.

3. to reasonably believe deadly force was immediately necessary

A defendant's perception of apparent is the rule unless there is a fact issue whether a person is an innocent bystander or an assailant. The *Dugar* court's "apparent danger" interpretation stretches the "rational inference" standard toward a defendant. In *Dugar*[94], the jury convicted the defendant of murder. The trial court denied a self-defense instruction because the defendant killed an innocent bystander. Two cars "sandwiched" the defendant's vehicles and chase began. An accident

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[93] *Wilson v. State*, 140 Tex. Crim. 424, 432 (1940).

[94] *Dugar v. State*, 464 S.W.3d 811 (Tex. App.—Houston [14th Dist.] 2015, pet ref'd).

occurred with multiple vehicles. Arguments ensued in a parking lot. Appellant stated the crowd was "vicious" and "ferocious" and blamed the defendant for the accident. Testimony corroborated that the crowd was like an angry mob. One person in the crowd had a gun and another gun might have been present. As the defendant fled the parking lot in his vehicle, the crowd pursued him on foot. "Even though he did not specifically see a gun pointed at him, appellant could have reasonably believed that the crowd was pursuing him for a sinister purpose: to shoot him while he was exposed and still within range." The defendant turned around and shot into the crowd. The bullet struck the victim—who was previously a passenger in the Cadillac. There are conflicting accounts whether the victim was a part of the crowd. The trial court held that the victim was an innocent bystander as a matter of law and denied any self-defense instruction. The court held that the defendant was entitled to a self-defense instruction.

A person who is driving away in a vehicle capable of traveling over 100 mph (or least exponentially faster than the group on foot) believes that a hostile group (on foot with possible firearms) behind him is an existential threat to the life of the defendant is a stretch. However, this

interpretation comports with the law that the analysis focuses on the threat as it is perceived through the defendant's eyes.[95]

Judge Keasler's dissenting opinion in *Gamino* echoes the notion that the standard has been lowered to allow only an inference that the defendant's "confession and avoidance" met each element including culpable mental state. "Today the Court does not explicitly say that "confession and avoidance" no longer applies to self-defense. But its acceptance of [defendant]'s defensive evidence as adequately confessionary in this context—because, according to the Court, a criminal act may be 'implied' from his version of events—amounts to the same thing."[96]

In *Sanders*[97], the trial court included self-defense instruction but denied a multiple assailant's instruction. A jury convicted the defendant of voluntary manslaughter. The defendant was hit with a pool cue inside a beer joint. The defendant was later diagnosed with a concussion. The

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[95] *Dugar v. State*, 464 S.W.3d 811, 818 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd)("[U]nder certain circumstances, a person may use deadly force against another, even if the other was not actually using or attempting to use unlawful deadly force.").

[96] *Gamino v. State*, 537 S.W.3d 507, 513 (Tex. Crim. App. 2017)(footnote omitted).

[97] *Sanders v. State*, 632 S.W.2d 346 (Tex. Crim. App. 1982).

defendant ran outside with a group following him. The group did not have a deadly weapon—even though one person was carrying a pool cue. "[The defendant's brother] testified that the white people were yelling and hollering and chasing appellant with a pool cue."[98] The defendant's brother testified that "[the defendant] were coming out the place backing up, falling down, trying to get them other people off him." The defendant testified that "they was running right behind me". "I was running. I was trying to get away from those people." The defendant claimed he merely shot to scare the group but did not intentionally kill the victim. The bullet killed a member of the group.[99] The Court of Criminal Appeals reversed and held that the defendant was entitled to a multiple assailant's instruction.

The *Dugar* and *Sanders* cases are distinguishable for several reasons. *Sanders* does not discuss whether the victim was an innocent bystander or disclose any testimony regarding the victim's actions. The *Dugar* opinion raised a fact issue whether the victim was an innocent

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[98] *Sanders v. State*, 632 S.W.2d 346, 347 (Tex. Crim. App. 1982).

[99] The *Dugar* opinion analyzed the *Sanders* opinion and included the following fact—"One of the shots struck the decedent, a man who had not attacked the defendant." After several thorough reviews of the Sanders opinion, the State is unable to locate the innocent bystander portion. In any event, the Sanders opinion does not discuss whether the victim was an innocent bystander.

bystander. The State's witness testified favorably for the State and said victim was quiet and did not make any threats and the defense witness said, "they were all after us." Here, there is no conflict in the evidence regarding Varley and Crumpton. At the time that Appellant discharged the firearm, Appellant stated that he only saw the victim, which would not qualify for multiple assailants.[100] There is no other testimony of what Appellant perceived at the time of discharging the firearm. Neither Varley nor Crumpton were a party to the hostile group because no evidence establishes that either participated, encouraged, or solicited the unlawful attack. As for Crumpton, there was only one story—that he ran over to and stood over Bryan. No testimony suggested that he approached Royal in any manner. Appellant does not argue defense of others on appeal.

As for Varley, Appellant argues the statements made by Varley minutes before the attack constituted a threat and caused Varley to be an assailant. Appellant argues that the following statements by Varley made her a party to the unlawful attack:

[100] 4 RR 39.

> I was just mad at him and I was just kind of -- I called him an asshole but I was glad to see him.[101]
>
> I believe you told the police that you said something to the effect of you can't be an asshole to me and come in here and not expect anybody to be upset about that …[102]

"It is well established that threats can be conveyed in more varied ways than merely a verbal manner."[103] "[I]t does not indicate any intention to cause death or serious bodily injury as defined by these statutes."[104] "The use of force against another is not justified in response to verbal provocation alone."[105] Appellant had prior relationship and no testimony contradicts Varley was an innocent bystander. The first clause—"You can't be an asshole"—implies that Appellant had a negative interaction at some point—either during or prior to that time. It does not imply she was hostile. The second clause—"I was glad to see him" negates in rational inference of hostility. The third clause—"and no expect someone to get mad"—refers to others solely becoming hostile. Also, Varley also testified she running after Royal when Royal was approaching Appellant.

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[101] 4 RR 75.

[102] 4 RR 75.

[103] *Horn v. State*, 647 S.W.2d 283, 284 (Tex. Crim. App. 1983).

[104] *Bundy v. State*, 280 S.W.3d 425, 435 (Tex. App.—Fort Worth 2009, pet. ref'd).

[105] *Gamino v. State*, 537 S.W.3d 507, 513 (Tex. Crim. App. 2017).

In *Kirkpatrick*[106], the court held that the defendant was not entitled to a self-defense instruction when the victim "hollered" and threatened to "kick his ass". In *Bundy*[107], the victim stated, "he would beat [defendant's] ass". "[I]t does not indicate any intention to cause death or serious bodily injury as defined by these statutes." "When [defendant] pointed his pistol at [the victim] he was responding to no more than verbal provocation." The court held that the defendant was not entitled to a self-defense instruction. Here, no testimony established that Appellant perceived her actions of running indicated Varley was approaching an unlawful attack.

Appellant testified that he believed in a general sense that that he was "mobbed"[108] or "five people following you out of that restaurant" were "assailants"[109]. In *McCray*[110], the defendant relies on a conclusory statement to try to get a multiple assailant's instruction— "short time frame raise[d] the issue of whether he perceived himself under attack

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[106] *Kirkpatrick v. State*, 633 S.W.2d 357, 358 (Tex.App.-Fort Worth 1982, pet. ref'd).

[107] *Bundy v. State*, 280 S.W.3d 425, 435 (Tex. App.—Fort Worth 2009, pet. ref'd).

[108] 4 RR 41; Varley also stated, "I just kind of just had my eye on Jordan, and I was just trying to get him. I didn't really see everyone else. I just know everyone was going after [Appellant]". 4 RR 65-66.

[109] 4 RR 40-41.

[110] *McCray v. State*, 2009 WL 806892 (Tex. App.—Fort Worth Mar. 26, 2009, pet. ref'd)(not designated for publication).

from all three persons." The defendant got into an argument with the victim in a parking lot and stabbed the victim and an undercover police officers who tried to intervene. Appellant claimed the "incident happened quickly in a 'matter of seconds' and that the "short time frame raise[d] the issue of whether he perceived himself under attack from all three persons." The court noted the "requested defense" relied on "the absence of evidence rather than on 'weak or strong, unimpeached or uncontradicted' evidence that was actually admitted." The court held that the defendant was not entitled to a multiple assailant's instruction.

In *Holmes*[111], the defendant testified that he thought the victim was walked toward defendant attempting to take away a baseball bat. This is not a hostile act or attempt at deadly force. There was no evidence of verbal threats. This is significant because of his relationship with Varley. In *Preston*[112], the court held that defendant was not under imminent attack because "there was no testimony or evidence from any source that

[111] *Holmes v. State*, 830 S.W.2d 263, 265–66 (Tex. App.—Texarkana 1992, no pet.).

[112] *Preston v. State*, 756 S.W.2d 22, 25 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd).

the victims were violent or that there was a history of violence between Appellant and any of the victims."[113]

The defendant in *Sanders* answered several questions similar as Appellant:

> Q. You were in fear of your life from these people; is that right?
>
> A. Sir?
>
> Q. I say you were in fear of your life from all these people?
>
> A. I was trying to get away from them to save my life.[114]

"[T]he testimony showed an attack by multiple assailants."

Appellant testified that:

> Q All right. And what did you see or hear after that?
>
> A I turned around and saw Mr. Royal leaned over Cody Bryan. I saw Austin and Damon Prichard running over there to Cody and standing over him, and Jordan immediately got up and was -- can I say indicating? -- for Stevenson to go around.
>
> Q Go around the car to chase you down?
>
> A I assume so, yes.
>
> Q Okay. They were pursuing you?

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[113] *Preston v. State*, 756 S.W.2d 22, 25 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd).

[114] *Sanders v. State*, 632 S.W.2d 346, 347 (Tex. Crim. App. 1982).

A Most definitely.[115]

Q Okay. Were you aware that there were five people following you out of that restaurant?

A Yes, sir.

Q You thought you were getting mobbed?

A Most definitely.

Q Did you consider all those as assailants?

A Yes, sir.[116]

The defendant uses "all these people". Here, Appellant basically concludes that five individuals in the parking lot were assailants. "Appellant's lack of knowledge as to the presence of weapons or what the victims were doing is distinguishable from situations justifying an instruction where there is affirmative evidence of some threat ..."[117]

Othe other hand, in *Dickey v. State*[118], the defendant brought the victim over to Mavis' residence. Mavis and the victim got into an argument over money. The victim and Mavis looked at each other and the defendant believed that both Mavis and the victim were about to turn on him. There was no actual evidence or actions for defendant to perceive

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[115] 4 RR 37-38.

[116] 4 RR 40-41.

[117] *Preston v. State*, 756 S.W.2d 22, 25 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd).

[118] *Dickey v. State*, 22 S.W.3d 490, 492 (Tex. Crim. App. 1999).

that the two were colluding. The Court of Criminal Appeals held that the defendant failed to prove harm by the trial court excluding the multiple assailant language in the jury charge. Mavis and Brown were essentially independent parties. Its like the four families showed up at Shea Stadium—with one on each base. This case symbolizes that one family cannot be combined with the other family to create a multiple assailants instruction. Similarly, Varley was not apart of the hostile group (i.e. became independent) and Crumpton had abandoned (if any) his pursuit of Bryan.[119]

> Similar to *McCray*, Appellant relies on a conclusory statement regarding Appellant's belief to support his claim that a multiple assailants instruction should have been included. The linchpin of a defensive instruction regarding multiple assailants is a "reasonable" belief by the person using deadly force.

"The mere assertion, after-the-fact, that Appellant believed he was under attack by multiple assailants is insufficient to support an instruction that Appellant reasonably believed he was under attack from multiple assailants, and there was no error in the charge." "The mere fact that the

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[119] See *Juarez v. State*, 886 S.W.2d 511, 514 (Tex. App. - Houston [1st Dist.] 1994, pet. ref d)("[If] record is silent about the conduct of the seven or eight other men [present] ... [t]here is no evidence to suggest that it was reasonable to think [they] were about to attack with deadly force.")(emphasis added). Here, any unaccounted-for gaps in time inure to the State.

accused "believed" the complainant might in some manner attack the accused, without evidence of any overt act or words that would lead the accused to reasonably believe he was in danger, is insufficient to give rise to a right to an instruction and charge on self-defense."[120]

Here, Appellant did not sufficiently raise "multiple assailants" because the mere fact that Appellant testified that multiple people "mobbed"[121] him or followed Jordan Royal to the altercation with Cody Bryan does not establish multiple assailants. "Mobbed" means either "a large or disorderly crowd; especially: one bent on riotous or destructive action".[122] Even though a mob or riot may correlate to unlawful conduct, this does not per se mean that either Cody Bryan nor Appellant were under an "unlawful attack" nor did either testimony suggest an "unlawful attack". "Mobbed" addresses "how" than "what". The "how" does not indicate whether Varley or Crumpton were associated with the "mobbed" feeling—or like *Dickey*, whether Varley and Crumpton were parties to an unlawful attack. Also, a general statement accusing a group as "assailants" without more is not sufficient. None of these statements

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[120] *Preston v. State*, 756 S.W.2d 22, 25 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd).

[121] 4 RR 41.

[122] "Mob" Merriam-Webster.com. Merriam-Webster, n.d. Web. 20 Apr. 2018.

come close to admitting to "reasonable" "fear".[123] The *Dickey* opinion shows that a "viewed from the accused's standpoint" is not absolute because the court denied an instruction even though the defendant believed that both Mavis and the victim were about to turn on him. It means that a witness cannot just state that the defendant was being attacked without more and receive a multiple assailant jury instruction. It also shows that all of the evidence must be viewed to determine through two spectrums—(1) as the defendant perceives it and (2) through a reasonable person in the defendant's person. The Dickey opinion confirms that whether the multiple assailant jury instruction should be given because may be a balancing act between these two standards and some evidence may take precedence over the other.[124]

Appellant only stated that Royal motioned for Stevenson to go around to chase Appellant down and pursue him. This does not indicate an unlawful attack. Cody Bryan testified that he couldn't see to tell

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[123] *Halbert v. State*, 881 S.W.2d 121, 124 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd).

[124] cf. *Villarreal v. State*, 393 S.W.3d 867, 874 (Tex. App.—San Antonio 2012)("The fact that the evidence raising the issue may conflict with or contradict other evidence is irrelevant in determining whether a charge on the defensive issue must be given.").

whether the group followed or not.[125] Stevenson was not involved in the altercation with Cody Bryan. There was no threat of an unlawful attack. Also, at the time that Appellant fired the weapon, Appellant stated that he only saw the victim, which would not qualify for multiple assailants.[126]

4. Defense of Others[127]

The trial court included the following defense of others instruction:

> A person is justified in using force or deadly force against another to protect a third person if- 1) under the circumstances the actor reasonably believes them to be, the actor would be justified, as in self-defense, in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and 2) the actor reasonably believes that his intervention is immediately necessary to protect the third person.[128]

Even though the testimony established that Crumpton ran over to Bryan, there was no testimony that Appellant perceived a continuing threat to Bryan nor was there testimony that Appellant shot contemporaneously with the Crumpton running over toward Bryan (i.e. establishing that running over was a threat to Bryan's physical safety needing a defense).

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[125] 4 RR 20.

[126] 4 RR 39.

[127] Appellant mentions defense of others on several occasions. Appellant included a proposed jury charge for defense of others. CR 120-121. Appellant does not argue or include the law on defense of others. As a result, Appellant failed to adequately brief this issue.

[128] CR 138.

Appellant's testimony was that he was consumed with his own defensive issues after Bryan was incapacitated and no testimony indicating Appellant's immediate need to "defend" Bryan. Royal left the altercation with Bryan and headed toward Appellant. Self-defense based on Royal's actions have clearly been completed. In any event, Appellant only testified to actions after Cody Bryan was assaulted. Appellant testified that the focus left Cody Bryan and went to Appellant as soon as Cody Bryan was punched. There was no testimony as to apprehension of multiple assailants against Cody Bryan. The mere fact that Pritchard, Crumpton, and Stevenson followed Jordan Royal into the parking lot does not meet the minimal threshold that Appellant's mind felt an apprehension of multiple assailants against Cody Bryan. Therefore, Crumpton was a hostile party with Royal regarding Bryan, and Appellant is not entitled to a defense of others instruction.

5. The State is Not Required to Prove Self-Defense

Appellant argues that the trial court erred by not including the following jury instruction:

> **Burden of Proof**
>
> The defendant is not required to prove self-defense. Rather, the state must prove, beyond a reasonable doubt, that self-defense does not apply to the defendant's conduct.

The State merely has the burden of persuasion regarding self-defense.[129]

> The defendant bears the burden of producing some evidence in support of a claim of self-defense. Once the defendant produces such evidence, the State bears the burden of persuasion to disprove that defense. The burden of persuasion is not one that requires the production of evidence. Rather, it requires only that the State prove its case beyond a reasonable doubt.[130]

"[A] defendant bears the burden of production, which requires the production of some evidence that supports the particular defense."[131] "Once the defendant produces such evidence, the State then bears the burden of persuasion to disprove the raised defense."[132] "The burden of persuasion is not one that requires the production of evidence, rather it requires only that the State prove its case beyond a reasonable doubt."[133] "When a jury finds the defendant guilty, there is an implicit finding against the defensive theory."[134]

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[129] Appellant also argues that the State misstates the law in closing argument. Appellant's Brief at 20. As stated herein, the State explained an accurate version of the law. In any event, Appellant failed to object at trial to preserve any error.

[130] *Rodriguez v. State*, 14-15-00844-CR, 2016 WL 6809173, at *2 (Tex. App.—Houston [14th Dist.] Nov. 17, 2016, no pet.)(citations omitted).

[131] *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003).

[132] *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003).

[133] *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003).

[134] *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003).

6. Conclusion

The trial court, relying on its own judgment, formed in the light of its own common sense and experience as to the limits of a rational inference from the facts presented, did not err in deciding that the issue of self-defense and multiple assailants were not raised by the evidence.

C. Harm Analysis

It is the defendant's burden to prove some actual harm occurred.[135] Some harm—actual harm and not theoretical—occurs when the error was "calculated to injure the rights of the defendant."[136] When analyzing harm, the court should consider (1) the jury charge as a whole; (2) the state of the evidence; (3) counsel's arguments; and (4) all other relevant information from the trial record.[137]

In determining jury charge error, a reviewing court first decides whether error exists.[138] If error is found in a jury charge, it is then analyzed for harm.[139] The degree of harm necessary for a reversal

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[135] *Dickey v. State*, 22 S.W.3d 490, 492 (Tex. Crim. App. 1999).

[136] *Almanza*, 686 S.W.2d at 171 ("In other words, an error which has been properly preserved by objection will call for reversal as long as the error is not harmless."); see *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013).

[137] *Almanza*, 686 S.W.2d at 171.

[138] *Ngo v. State*, 175 S.W.3d 738, 743-44 (Tex. Crim. App. 2005).

[139] *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985); *Ngo*, 175 S.W.3d at 743-44.

depends on whether the appellant preserved the error by objection.[140] When, as in the present case, a defendant fails to object to the charge, he is required to show egregious harm.[141]

Errors which result in egregious harm are those which affect the very basis of the case, deprive the defendant of a valuable right, or vitally affect a defensive theory.[142] The error must have been so harmful as to effectively deny the defendant a fair and impartial trial.[143] "Egregious harm is a difficult standard to prove and such a determination must be done on a case-by-case basis."[144]

1. Jury Charge

"Texas courts have held that when a defendant claims self-defense, his rights are fully preserved (and the concept of "apparent danger" is properly presented) when a jury charge (1) states that a defendant's conduct is justified if he reasonably believed that the deceased was using or attempting to use unlawful deadly force against the defendant, and (2)

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[140] *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985).

[141] *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985); see also Tex. R. App. P. 33.1.

[142] *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996).

[143] *Roberts v. State*, 321 S.W.3d 545, 554 (Tex. App.-Houston [14th Dist.] 2010, pet. ref'd)(citing *Warner v. State*, 245 S.W.3d 458, 461 (Tex. Crim. App. 2008)).

[144] *Hutch*, 922 S.W.2d. at 172; *Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011).

correctly defines 'reasonable belief.' "[145] "In other words, by defining "reasonable belief" in accordance with the penal code, a trial court adequately relates to the jury that 'a reasonable apprehension of danger, whether it be actual or apparent, is all that is required before one is entitled to exercise the right of self-defense against his adversary.' "[146]

Texas caselaw does recognize the law of parties[147] in self-defense situations with hostile groups.[148] The trial court did not err in refusing to provide a charge on transferred intent. Regardless, Appellant did not object.[149] The jury instructions properly set forth the elements of the offense and justification charge was legally correct in its application of the law to the facts of the case.

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[145] *Bundy v. State*, 280 S.W.3d 425, 430 (Tex. App.—Fort Worth 2009, pet. ref'd).

[146] *Bundy v. State*, 280 S.W.3d 425, 430 (Tex. App.—Fort Worth 2009, pet. ref'd).

[147] Tex. Pen. Code § 7.02(a)(2).

[148] See, e.g., *Dickey v. State*, 22 S.W.3d 490, 493 (Tex. Crim. App. 1999)(Keller, J., concurring)("The rule concerning multiple assailants is essentially an application of the law of parties to the defendant's assailants."); *Black v. State*, 145 S.W. 944, 947 (1912)(holding Appellant is entitled to act in self-defense against another that is part of a larger group of assailants when they "in any way are encouraging, aiding, or advising the real assaulting party."); Tex. Pen. Code § 7.02.

[149] See *Almanza*, 686 S.W.2d at 171.

2. State of the Evidence

The indictment for deadly conduct included "Varley and Crumpton". If Appellant is not entitled to a self-defense instruction for Varley, then Appellant is not entitled to a multiple assailant's instruction for Crumpton. This conjunctive language requires both and if one is missing, then both fail. The allowable unit of prosecution for the offense of deadly conduct "is each discharge of the firearm"—than each individual person in a group present when the gun was discharged.[150] The State is required to prove that Appellant discharged the firearm in the presence of both Varley and Crumpton. Even if the lack of a multiple assailants charge improperly comments that Varley and Crumpton are innocent bystanders, it is not egregious harm.[151]

3. Counsel's Arguments

During closing arguments, the State provided an overview of the facts and focuses on the dynamics between Royal, Varley, and Appellant. Both the State and Appellant mentioned "self-defense" and "deadly force", but neither discuss self-defense regarding a specific offense.

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[150] *Miles v. State*, 259 S.W.3d 240, 249 (Tex. App.—Texarkana 2008, pet. ref'd).

[151] *Lin v. State*, 2008 WL 257184, at *5 (Tex. App.—Houston [1st Dist.] Jan. 31, 2008, pet. ref'd)(not designated for publication).

Referring generally to "self-defense" suggests that both offenses have a self-defense instruction, which the trial court did include a self-defense instruction for both offenses. The State did mention that the State does not have to disprove Appellant's self-defense claim.

4. All other relevant information from the trial record

- **The denial of instruction did not cause Appellant to be without any defensive strategy.**

Appellant argues he was left "without his fundamental—and only—defense, self-defense. Appellant was not left with one defensive avenue. First, the trial court included a self-defense instruction for each offense, which Appellant argued during closing arguments. Also, these defensive issues are not the "law applicable to the case" because the testimony did not raise these issues.[152] The trial court was under no duty to instruct the jury on these issues. Because there was no error in the charge, an analysis of the degree of harm is unnecessary.

[152] *Rodgers v. State*, 180 S.W.3d 716, 721 (Tex. App.—Waco 2005, no pet.)("[D]efensive issues (even if statutorily-defined) do not constitute the "law applicable to the case" unless the defendant makes them so by presenting evidence to support their submission in the charge and by requesting their inclusion in the charge.").

VI. PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, there being legal and competent evidence sufficient to justify the conviction and punishment assessed in this case and no reversible error appearing in the record of the trial of the case, the State of Texas respectfully prays that this Honorable Court affirm the judgment and sentence of the trial court below.

Respectfully Submitted:

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VII. CERTIFICATE OF COMPLIANCE

I, Randle Smolarz, certify that, pursuant to Rule 9 of the Texas Rules of Appellate Procedure, State's Brief contains 13,577 words, exclusive of the caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix.

/s/ Randle Smolarz
Randle Smolarz

VIII. CERTIFICATE OF SERVICE

I, Randle Smolarz, certify that I have served a true and correct copy of the foregoing Brief for the State upon Attorney for Appellant on April 12, 2019.

/s/ Randle Smolarz
Randle Smolarz